MALAYSIAN REPORTS

BEH HENG SEONG v. PUBLIC PROSECUTOR

[A.Cr.J. (Chang Min Tat J.) February 25, 1972]

[Penang — Criminal Appeal No. 12 of 1972]

Evidence — Hearsay evidence — Allegation on label attached to goods — Inadmissible against accused — Exceptions to hearsay rule not extended to include labels or markings.

Criminal Law and Procedure — Charge — Insufficient evidence showing relationship of person before the court and the one charged — No prima facie case established — Accused's failure to rebut — Effect of.

The appellant was charged with a breach of the Sale of Food and Drugs Regulations by manufacturing sour plum juice which contained saccharin, which is prohibited for use in the manufacture of food or drinks. Two other charges were laid in respect of the designation and the absence of an address on the label which was attached to the bottle. The appellant remained silent when called upon to give evidence. He was convicted on all three charges and was fined $100 on each charge. He appealed against the convictions and sentences.

In the court below, the evidence for the prosecution was to the effect of discovering a bottle of the sour plum juice in a bottle offered for sale and labelled with a piece of paper bearing a certain portrait, and alleging that the manufacturer was one Beh Kwang Chee. There was no indication whatsoever whether Beh Kwang Chee was a shop or of the address of this person or shop.

One fundamental objection was the admissibility of the label, in evidence, against the appellant. This point was not taken up in the court below nor in the present appeal.

Held, allowing the appeal: (1) in the absence of proof that the name Beh Kwang Chee was the name of a shop and that Beh Heng Seong was the proprietor of this shop, it would not appear that a *prima facie* case had been established against the appellant which, failing his rebuttal, would warrant his conviction;

(2) on the authority of *Myers* v. *Director of Public Prosecutions*,[1] and *Patel* v. *Comptroller of Customs*,[2] the allegations on the label must be regarded, as a matter of evidence, as hearsay and inadmissible against the appellant. In the present case, it was clear that there was no evidence or no admissible evidence against the appellant. Therefore, the convictions must be quashed.

[**Editorial note:** By virtue of the Privy Council decision of *Patel* v. *Comptroller of Customs*,[2] the decision of Adams J. in *Public Prosecutor* v. *Chi Ah Kow & Ors.* [1963] M.L.J. 122, annotated under para. 5071 of *Mallal's* Digest, 3rd Edn., can no longer be regarded as good law].

Cases referred to:-

(1) *Myers* v. *Director of Public Prosecutions* [1965] A.C. 1001; [1964] 3 W.L.R. 145.

(2) *Patel* v. *Comptroller of Customs* [1966] A.C. 356 P.C.; [1965] 3 W.L.R. 1229.

MAGISTRATE'S CRIMINAL APPEAL.

A. Jayadeva for the appellant.

Azmel bin Haji Ma'amor (Deputy Public Prosecutor) for the respondent.

Chang Min Tat J.: One Beh Heng Seong, described as the proprietor of Chop Beh Kwang Chee Medical Factory of 674 Jalan Kuala Ketil Sungei Patani was charged with a breach of the Sale of Food and Drugs Regulations by manufacturing sour plum juice in which there was saccharin. Two other charges were laid respecting the designation and the absence of an address on the label.

Saccharin as a substitute for sugar is totally prohibited for use in the manufacture of food or drinks, so that the offence charged is of that type known as statutory in which *mens rea* is not a necessary ingredient.

The evidence for the prosecution which was conducted by an officer of the City Council was to the effect of discovering a bottle of the sour plum juice in a bottle offered for sale and labelled with a piece of paper bearing a certain portrait and alleging that the manufacturer was one Beh Kwang Chee. There was no indication whatsoever whether Beh Kwang Chee was a shop (the name was not preceded by the normal indication "Chop", as in the charge) or of the address of this person or shop. The chemist gave evidence of the detection of a fairly minute quantity of saccharin but however minute the quantity, the presence of saccharin in food offered for sale constituted an offence. The third and last witness was the person from which the Drugs and Food Inspector had bought the bottle of plum juice. He did not say one word as to the source of his purchase.

The appellant, when his evidence was called, remained mute of malice, presumably, on the advice of his counsel. On being convicted on all three charges, he was fined $100 on each charge. Against the convictions and sentences he appealed.

The label was clearly not in conformity with regulations so that it was clear that there were committed the three breaches of the regulations complained of. Nonetheless, it was the duty of the trial court to be satisfied that it was the person before the court and the one charged who committed the offences. As to this, all I could say after reading through the grounds of judgment was that there did not appear to have been any attempt made to resolve this basic question. Though the person charged had the same surname "Beh" on the label, there was the obvious difference in name. The former was Beh Heng Seong, the manufacturer was alleged to have been Beh Kwang Chee. In the absence of proof that the name Beh Kwang Chee was the name of a shop and that Beh Heng Seong was the proprietor of this shop, it would not appear that a *prima facie* case had been established against the appellant which failing his rebuttal would warrant his conviction.

A more fundamental objection was the admissibility of the label against the appellant. It was a point not taken at the court below by either the prosecution or the defence and in the absence of advice from the Bar which he of course had a right to expect, by the learned trial magistrate. It was also not taken before me but clearly on the authority of *Myers* v. *Director of Public Prosecutions*[1] and *Patel* v. *Comptroller of Customs*,[2] the allegations on the label must be regarded as a matter of evidence as hearsay and inadmissible against the appellant. In the latter case, the appellant was charged with making a false entry in that he declared the origin of the corriander seeds to be India whereas it was Morocco. The case for the prosecution relied entirely on the labels and markings which asserted that the goods were the "produce of Morocco." On appeal, the Privy Council held that

the legend "produce of Morocco" written on the bags was from an evidential point of view inadmissible against the appellant as hearsay and that the list of exceptions to the hearsay rule could not be extended to include such things as labels or markings.

It was clear that there was, in the case under appeal, no evidence or no admissible evidence against the appellant.

The appeal was therefore allowed, the convictions quashed and the fines if paid were ordered to be refunded.

Appeal allowed.

Solicitors: *Jayadeva & Zahir.*

WONG LANG HUNG v. NATIONAL EMPLOYEES' MUTUAL GENERAL INSURANCE ASSOCIATION LTD.

[O.C.J. (B.T.H. Lee J.) March 9, 1972]

[Sibu — Civil Suit No. 64 of 1968]

Insurance — Fire insurance — Action to recover under policy — Failure to commence arbitration proceedings within period mentioned in policy — Exception clause — No misrepresentation to induce plaintiff to sign proposal form — Suppression of material facts — Policy void — Proposal form completed by agent of insurance company — Agent is agent of insured.

The plaintiff brought the action against the defendants to recover the sum of $20,000 on a policy of fire insurance issued by the defendants to the plaintiff. The defendant company pleaded (1) that there was material mis-statement in the proposal form which stated that the house was not attached to any building when in fact it was so attached; (2) that the plaintiff had failed to commence arbitration proceedings within the period mentioned in the policy. In her reply the plaintiff alleged that she had been induced to sign the prepared form by the misrepresentation of the defendants' agent, and because of this, the defendants were not entitled to rely on the exception clause, which purported to except the defendants from common law liabilities.

Held: (1) there was no misrepresentation on the part of the defendants and as it was conceded that the plaintiff had failed to commence arbitration proceedings before the period mentioned in the policy, this was a bar to her claim;

(2) as the answers in the proposal form were untrue and there was a suppression of material facts, the policy was void and the plaintiff could not recover;

(3) the agent of the defendants in completing the insurance form was acting as the plaintiff's agent and not on behalf of the defendants.

Cases referred to:

(1) *Curtis* v. *Chemical Cleaning and Dyeing Co. Ltd.* [1951] 1 All E.R. 631.

(2) *Karsales (Harrow) Ltd.* v. *Wallis* [1956] 2 All E.R. 866.

(3) *Smeaton Hanscomb & Co. Ltd.* v. *Sasson I. Setty Son & Co.* [1953] 2 All E.R. 1471.

(4) *John Carter (Fine Worsteds) Ltd.* v. *Hanson Haulage (Leeds) Ltd.* [1965] 2 Q.B. 495 at p. 528.

(5) *Suissee Atlantique Societe D'Armement Maritime S.A.* v. *N.V. Rotterdamache Kolen Centrale* [1967] 1 A.C. 361 at pp. 421-422.

(6) *Dawsons Ltd.* v. *Bonnin and Ors.* [1922] All E.R. Rep. 88 at p. 94.

(7) *London General Omnibus Co. Ltd.* v. *Holloway* [1911-13] All E.R. Rep. 518 at p. 524.

(8) *Newsholme Brothers* v. *Road Transport and General Insurance Co. Ltd.* [1929] 2 K.B. 356 at p. 362.

(9) *Joel* v. *Law Union and Crown Insurance Co.* [1908] 2 K.B. 863 at p. 878-

(10) *O'Connor* v. *B.D.B. Kirby Co.* [1971] 2 All E.R. 1415.

CIVIL SUIT.

Joseph C. C. Tang for the plaintiff.

S. K. Reddi for the defendants.

B.T.H. Lee J.: This action was brought by the plaintiff against the defendants to recover the sum of $20,000 on a policy of insurance issued by the defendants to the plaintiff on 4th January, 1966.

On 16th August, 1966, the premises was destroyed by fire. The plaintiff made a claim against the defendants under the policy, but the defendants repudiated liability. This action was then brought.

The plaintiff by paragraphs 2 and 4 of her statement of claim alleges as follows: —

"2. On the 17th day of August 1966, the said house was destroyed completely by fire.

3. .....

4. Particulars of the said loss and damage which were duly delivered by the plaintiff to the defendant's agent at Sibu on the 17th day of August 1967 are as follows: —

(a) Extent of loss — Total destruction by fire of the dwelling-house insured with timber walls and billian timber roof situate at Lanang Road, Sibu on or about the 17th day of August, 1967.

(b) Cause of fire — by unknown Trespassers".

By his defence as amended the defendants denied the claim and pleaded *inter alia*: —

"2. The defendants deny paragraph 2 of the statement of claim.

3. The said policy was issued pursuant to a proposal form signed by the plaintiff on the 29th December, 1965. To question 8 of the proposal form which reads:

'Are the premises attached to other building? If so, state construction and occupation of adjoining building'. the plaintiff answered 'No'.

4. In pursuance of the said proposal form and the declaration of the truth of the statement or statements contained in the answers, the defendants issued the said policy, the first recital of which provided (*inter alia*) that the written proposal and declaration therein containing the statements shall be the basis of the contract and be considered as incorporated therein. The defendants will refer to the said proposal form and the said policy for its full terms and effect at the hearing of this action.

5. The defendants will contend that at all material times the answer given by the plaintiff to question 8 of the proposal form was untrue when in truth and in fact the building was attached to another building, and that accordingly the defendants are not liable under the said policy.

6. Further, the said policy contained a warranty that during the currency of the policy the building insured was detached by at least 20 feet on all sides from any other building (excluding small outhouses).

7. The defendants will contend that at all material times, the building insured was not detached and also not detached by at least 20 feet on all sides from any other building and that accordingly the plaintiff was in breach of this warranty.

8. Further, the said policy was issued subject to *inter alia*, condition 8 which provides that the insurance ceased to attach as regards property affected if the nature of the occupa-